19 46 K **File No.** B. Bigamous - Marriages/46.

Legal **DEPARTMENT**

B **BRANCH**

~~B/30/5~~

P 45(E)/1946

Subject:— Bill no. ~~XXXI~~ of 1938.

A Bill to provide for the prevention of Bigamous Marriages among Hindus in the Presidency of Bombay by Mrs Lilavati K. Munshi

(L.A. bill no. XII of 1946)

Bom. Act. no. XXV of 1946

File No. B. Bigamous Marriages/46

Std. Sectt. Slip 24 B a.

535-B.

CONTENTS.

Legal Department File No. B Bigamous Marriages/46

Sr No.		Subject	pages
		A Bill to provide for the Prevention of Bigamous Marriages.	
1.	—	Pergress sheet -	1-4
2.	—	Copy of the draft Bill -	5-12
3.	—	Statement of the case to Adv. General - not sent actually -	13-18
4.	U.R.to H.D. No.188-L dated 11-7-46	A tentative draft Bill and remakrs thereon -	19-34 (PP.21-34 notcopied)
5.	Letter from the Govt. of Mysore-	Sending a copy of Infant Marriages Prevention Regulation -	35-48 (not copied)
6.	G.R.L.D. No. 257-L dated 20-7-46	Publication of the Bill -	49-54
7.	L.D.R.I. No 478-L dated 29-7-46	copy of Travancore Enactment -	55-72 (pp.57-72 notcopied)
8.	Letter from Legal Remembrance of Boaroda -	Legislation in the Baroda State in respect of -	73-78 (pp.75-78 not copied)
9.	———	Copy of the Bill No.XII of 46	79-82
10	U.R to Adv.Gen, No 407-Personfi. dt. 23-8-46 and Adv.Gen's No.20 dated 3-9-46	Statement of the case and Opinion of the Advocate "General	83-92
11		Report of the Select Committee -	93-98
12	L.D.R.I. 6606 dt. 6-8-46	Similar enactments from the state Kotah -	99-124 (pp.101-124 not copied)
13	—	Proceedings of the select Committee -	
14	L.D.R.I.No.665-L dt. 23-8-46	Similar enactments from Kotah-	147-148
15	—	Report of the Select Committee	149-150
16	—	Spare copy of the Adv.General's Opinion dated 3-9-46 -	157-160 (not copied)
17	G.L.L.D.No.7673 dated 2-11-46	Seeking Governor's assent —	161-1
18.	Letter from S.G.dt.6-11-46	Forwarding an Authentic Copy -	163-
19.	G.R.L.D.No.775D dt. 6-11-46	Publication of the Act -	16
20.	—	Copy of the Statement of the Case	1 (not co
21.	—	Note of the Secy.L.D.on the provisions of the Bill etc.	1
22.	—	Debates -	19

N.R.D.-

A BILL TO PROVIDE FOR THE PREVENTION OF BIGAMOUS MARRIAGES AMOUNG HIUDUS IN THE PRESIDENCY OF BOMBAY.

Whereas it is expedient to provide for the prevention of Bigmous marriages amoung the Hindus in the Presidency of Bombay; it is hereby enacted as follows:

1. This Act shall be called the Provention of Hidu Bigamous Marrages Act of 193.

2. It shall extend to the whole Presidency of Bombay.

3. It shall apply to all the Hindus permenently residing or voluntarily living for trade, or business or for earning their livelihood in the Presidency of Bombay.

4. It shall come into force one year after the Act having been certified by the Governor, has been published in the Bombay Government Gazette.

5. "Big mous Marriage" means a person having a wife or husband living, contracts another marriage with a women or man unless such a wife or husband has been legally divorced by the order of a competent Court or whose marriage is otherwise void or declared to be void by an order of a competent Court or according to the custom of the caste to which either of the parties belongs.

5 (a). "Officiating Priest" means a person who performs the religious rites and ceremonies but for which performance and but for whose presence the marriage would be null and void according to the law and custom of the the community to which the marrying parties or either of them belong.

5.(b) "Hindu" shall include a Jain, an Aryya Samajist or a Convert to Hinduism.

6. Every person who shall, after the commencement of this Act, during the lifetime of his or here wife or husband perform or contract any marriage in the Presidency of Bombay without having been lawfully divorced, such wife or husband shall be guilty of the offences under section 494 and 495 of the Indian Penal Code and will be subject to the penalities contained therein

M.R.D. -
16-5-56
C.4

7. Whoever acts as a priest at the bigamous marriage or aids or abets or in any way facilitates the bigamous marriage shall be punished with either imprisonment which may extend to 6 months or fine or both.

8. Every marriage so performed after the commencement of the Act shall be void.

STATEMENT OF OBJECTS AND REASONS.

It is time that the Hindu Society looks up to the necessity of moving with the times. The Hindu Society is now sufficiently advanced to introduce such a measure. If the women have to be raised to a status of equality with men, the institution of polygamy which more or less treats women as chattels should be abolished. This Bill is intended to extend the penalty attached to bigamy to a man who marries more than one wife.

Bombay,
25th December 1937.

LILAVATI K. MUNSHI,
M.L.A.

M.K.D.
K-5-96
3.4

Bill No. of 1938.

A Bill to provide for the prevention of bigamous marriages among Hindus in the Province of Bombay.

WHEREAS it is expedient to provide for the prevention of bigamous marriages among Hindus in the Province of Bombay; it is hereby enacted as follows:-

Short title, extend and commencement.

1. (1) This Act may be called the Bombay Prevention of Hindu Bigamous Marriages Act, 1938.

(2) It extends to the whole of the Province of Bombay.

(3) It shall come into force on such date as the Provincial Government may, by notification in the Official Gazette, appoint.

Application.

2. The Provisions of this Act shall apply to Hindus only.

Definitions.

3. In this Act, unless there is anything repugnant to the subject or context, —

(1) "Bigamous marriage" means the marriage of a person during the life time of his or her wife or husband, if the marriage of such person with such wife or husband has not been dissolved or decalred void by a Court of competent jurisidiction, or is not void according to the the custom or usage of the community to which either of the parties to such marriage belongs.

(2) "Hindu" includes a Jain, a follower of the Arya or of Brahma Samaj or a convert to Hinduism.

(3) "Minor" means any persons of either sex who is under eighteen years of age.

H.R.D.
16-5-56
C.4

P.T.O.

Penalty for bigamous Marriage,

4. Whoever not being a minor contracts a bigamous marriage shall be deemed to have committed an offence under section 494 or 495 of the Indian Penal Code as the case may be notwithstanding any law, custom or usage to the contrary.

Solemnizing penalty for ~~solemnizing~~ a bigammous marriage.

5. Whoever performs, conducts or directs any bigmaous marriage shall be punished with imprisonment of either description for a term which may extend to six months or with fine or with both, unless he proves that he has reason to belive that the marriage was not a bigamous marriage.

Penalty for parent or guardian concerned in a bigamous marriage,

6. (1) When a minor contracts a bigamous marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity lawful or unlawful, who does any act, performs the marriage or permits it to be solemnized, shall on conviction be puhishable with imprisonment of either descripton which may extend to six months or with fine or with both.

(2) For the pruposes of this section it shall be presumed, unless and until the contrary is proved, that when a minor has contracted a bigamous marriage the parent or guardian having charge of such minor has negligently failed to prevent the marriage from being solemnized.

Bigamous marriage. to be void.

7. Notiwithstanding any law, custom or usage to the contrary every bigamous marriage shall be void.

Bombay,
13th April 1938.

(Sd) Lilavati K. Munshi.

M.R.D.
16-5-56
C.4

Statement of the Case.

The question for consideration is whether there is any legal objection to making a provision in the Bigamous Marriages and the Prevention of unequal Marriages Bills that a bigamous marriage or an unequal marriage contracted outside the Province of Bombay shall be deemed to be invalid for all purposes in the Province such as inheritance, legitimacy etc.

2. Under section 99 if the Government of India Act, 1935, a Provincial Legislature has power to make laws for the Province or for anypart thereof. The powers of the Provincial Legislature are confined to the limits of the Province for which it can make laws but when acting within its territorial ~~limits~~ limits its powers in respect of matters with respect to which it can make laws are as supreme and plenary as those of Parliament itself. As Lord Macmillan observed in the case of Croft. vs. Danply(1933 A.C. 156) atpage 163. - "Once it is found that a particular topic of legislation is among these upon which the Dominion Parliament may competently legislate .... their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State", In the above case Lord Macmillan aptly refers to the case of Hodge vs. the Queen(9 A.C. 117) wherein Sir B.Peacock delivering the judgment said "When the British North America Act enacted that there should be legislature for Ontario and that its legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred

M.R.D.
6-5-56
C.4

powrs not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample ~~with~~ within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed or could bestow". The same is true of the Provincial Legislatures constituted under the Government of India Act. 1935. It would be thus open to a Provincial Legislatue to enact in virtue of entries 6 and 7 in List III and entry 21 in List II that for the purposes of inheritance to any property situate in the Province or for the pruposes of anyrights arising in the Province a bigamous or unequal m.....e contracted outside the Province shall be deemed to be invalied and in so far as the operation of such a provision is restricted to the property situate in the Province or the rights arising in the Province it maynot be considered as having any extra-territorial operation. It will be accordingly competent for the legislatues to decide whether to extend or not the relevant provisions of their enactments to persons ordinarily resident or domiciled in the Province. So long as the legislation is territorially confied to the lawful jurisdiction of the legislature it will be competent for the legislatue ~~it will be~~ to make provision by law as regards both person and property. It seems to me therefore competent for the Provincial Legisalture to enact a provision that in respect of persons and/or properties situate within the limits of the province a bigamous or an unequal marriage wherever performed(i.e. even outside the Province) will entail certain consequences viz. that it shall be deemed to be invalid for purposes of inheritance, legitimacy, etc.

M.R.D.-
16-5-56
e.4

(3)

Although such a course involves taking cognizance of or dealing with actions outside the local jurisdiction, inasmuch as the consequences are to be confined to the local jurisdiction of the legislature in a matter in which it possesses plenary powers, it appears that such a provision will not be ultra vires or illegal.

3. As, however, the question is not entirely free from doubt, the Advocate General has requested to express his opinion.

Remembrancer of Legal Affairs.

U.O. to the Advocate General, Bombay, No.

dated the April 1939.

M.R.D.
16-5-56
C.A

Office of the B.L.A.

A tentative draft of the Monogamy Bill is submitted herewith.

2. Mrs. Himshi's Bill, as it stands, will hardly be effective to check the evil of bigamous marriage. There is no express provision to prevent a Hindu domiciled in this Province from contracting a bigamous marriage beyond the limits of this province and returning home with his new spouse.

3. The essential validity of a marriage is governed by the lex domicilii of the parties. If a polygamous marriage is recognised as valid by the law of the domicile of the parties, it will be recognised as valid all over the world, and effect will be given to the legal consequences flowing from the union so far as regards the legitimacy of children of of the marriage or rights of succession to property. If by the lex domicilii of the contracting parties a polygamous marriage is void, it will be equally void elsewhere. The marriage must be a good and legal marriage according to the law of the domicile of both contracting parties at the time of the marriage, and not merely according to the law of the domicile of the husband.(See Halsbury's Laws of England, Vol. 6, PP. 284-286). That being the legal position under the international law, it ~~should~~ would be open to the Provincial Government to declare void all bigamous marriages contracted by Hindus within the province. It would also be competent for the provincial Government to declare void bigamous marriages contracted beyond the limits of the province if either or both the contracting parties have their domicile in this province. A provision has, therefore, been made in clause 4(b) that a bigamous marriage contracted beyond the limits of the Province shall also be void if either or both the contracting parties to such marriage are domiciled in the Province. Legislation in respect of such provision will not be regarded as having extra territirial operation within the meaning of section 99 of the Government of India Act, 1935 inasmuch as it is open to the Provincial Government to legislate in respect of persons domiciled in the Province.

4. A new clause 8 has been added to provide that the offences under clause 8 has been added to provide that the offences under clauses 6and7 shall be triable only ~~as~~ by a Presidency Magistrate or a First Classs Magistrate.

5. The Bill falls under entries 6,1 and 2 in List III in the Seventh Schedule to the Government of India Act, 1935. The Bill does not

P.T.O.

The Bill does not require any sanction or recommendation or effect any special responsibility under the said Act. As the Bill does not contain any provisions repugnant to the provisions of an earlier Federal law or an existing Indian law relating to a concurrent matter, it will not be necessary to reserve the Bill for the consideration of the Governor General under section 107 (2) of the said Act.

Sd/-F.H.J.
11-7-46

Remembrancer of Legal Affairs.

U.R. to U.D. No. 180-L dated the 11th July 1946.

M.R.D.
16-5-56
C.4

BILLS.

A Bill to provide for the prevention of bigamous marriages among Hindus.

GOVERNMENT OF BOMBAY.
Legal Department.
Resolution No. 257-2
Council Hall, Poona, 20th July 1946.

Memorandum from the Home Department. No. 321/5-B, dated the 19th July 1946.- Transferring for necessary action, the papers relating to a Bill to provide for the prevention of bigamous marriages among Hindus.

RESOLUTION.- The Bill with the Statement of Objects and Reasons should be forwarded to the Manager, Government Central Press, Bombay, for publication in the Bombay Government Gazette, dated the 22nd July 1946, as Bill No. XXI of 1946.

2. The Bill and the Statement of Objects and Reasons should be translated into Marathi, Gujarati, Kannada and Hindustani(in Urdu and Devnagari scripts) and the translation should be published in the Bombay Government Gazette on the 25th July 1946.

3. The dates of the various publications should be reported to the Secretary to the Bombay Legislative Assembly.

By order of the Governor of Bombay,

Sd/-
K.M. CHITNAVIS,
Assistant Secretary to the Government of Bombay, Legal Department.

To

The Manager, Government Central Press, Bombay(with the Bill and S.O.R. and with a request that 230 Gazette copies of the Bill and the Statement of Objects and Reasons may be forwarded to the Secretary to the Bombay Legislative Assembly for distribution to the Members of the Bombay Legislative Assembly and 25 copies for the use of the legal Department).

The Home Department,) with a copy
*The Oriental Translator to Government,) of the Bill
The Secretary to the Bombay Legislative) and S.O.R.

*With five extra copies of the Bill

H.R.D.
16-5-36
C.A.

GOVERNMENT OF TRAVANCORE.

Huzur Cutcherry,

Trivandrum 26th July 1946.

THE SECRETARY TO GOVERNMENT.

To

THE Secretary to the Government of Bombay,
Legal Department, Council Hall, Poona.

Ref:- Your letter No. 119-L dated 1/7/1946 re: Acts prohibiting bigamous and unequal marriages in this State.

Sir,

I am to inform you that there is no law prohibiting bigamous and unequal marriages as such among all communities in this State. Bigamy is a marital offence under the Penal Code; and by special social legislation relating to certain communites bigamy has been constituted an offence under those enactments. Under the Special Marriage and Succession Act (a copy of which is enclosed) bigamy is an offence if the bigamous marriage is contracted by anyone who has married under that Act.

Yours faithfully,

Sd/-

For Secretary to Government

H.R.D.
16-5-96
G.4

No. 1580/1 of 1945-46. Legal Remembrancer's office,

Baroda, 4th July 1946.

To

P.N. Mehta, Esquire, C.I.E., Bar-at-law, I.C.S.,
Secretary to the Government of Bombay,
Legal Department.

Sir Sub.:- Legislation prohibiting bigamous and unequal marriage.

With reference to your letter No. 114-L dated the 28th June 1946 addressed to the ~~Chief~~ Chief Secretary to the Government of Baroda, I have to state that as regards bigamous marriages sections 116 and 148 of the Hindu Code are amended by Act No. VIII of 1942 so as to prohibit such marriages. A copy of the sections as amended is enclosed herewith for ready reference.

As regards unequal marriages I have to state that no legislation is passed by the Government prohibiting such marriages so far.

Sd./

Legal Remembrancer.

M.R.D.
16-5-96
C.4

Attention is invited to clause 4 of the Bill to provide for the prevention of bigamous marriages among Hindus which has passed the Select Committee stage and will shortly be taken up for the second reading in the next Assembly session.

2. Clause 4 provides:

"Notwithstanding any law, custom or usage to the contrary, a bigamous marriage shall be void,-

(a) if it is contracted in this province after the coming into force of this Act,

(b) if it is contracted beyond the limits of this province after the coming into force of this Act and either or both the contracting parties to such marriage are domiciled in this province."

3. During the Select Committee stage doubts were raised in certain quarters as to whether there can be a provincial domicile. I have held that it is possible to have a Provincial domicile. I am fortified in this view by the following authorities:-

(1) SCHEME'S JUDICIAL DICTIONARY
(Pp. 556, 567)

"DOMICIL: DOMICILED.- A person's Domicil' means, generally speaking, the place where he has his permanent home (Whicker v. Hume, 23 L.J.Ch. 996,400; 7 H.L. Ca. 124; Udny v. Udny, 31 L.J. Ch. 314,320; 1 H.L. C.31). The word 'domicil' has many meanings, according as it is used with reference to Succession, or for determining Rights of Belligerents, or ascertaining Trading Privileges.

Art. 63, Civil Code of Lower Canada provides that a Marriage shall be solemnized at the place of the 'Domicil,' of the parties, to be established by a six months' residence; there 'Domicil,' means RESIDENCE, and does not refer to International Domicil (Abd-ul-Hamid Khan v. Unsworth, 59 L.J.P.C.7; 14 App. Ca. 632).

The words 'Domiciled in England,' s.6(1 d), Bankruptcy Act, 1883, mean, domiciled in England as distinguished from Scotland or Ireland as well as from foreign countries (Ex. P. Cunningham, Re Mitchell, 53 L.J.Ch. 1067). Vf. ORDINARY RESIDENCE."

(2) HALSBURY'S DICTIONARY OF LAW TERMS
& PHRASES (p.113)

"Domicile. The place in which a man has his fixed and permanent home, and to which whenever he is absent, he has the intention of returning; and that is generally construed to be the place at which he usually keeps his wife and family or household goods.....
Two things must concur to constitute domicile - (1) the residence, and (2) the intention of making it the home of the party.

The law of a man's domicile for the time being (whether original or acquired) determines all his personal capacities and incapacities, and also regulates the distribution or devolution of his personal estate or moveable property in case of his death intestate."

P.T.O.

(3) DICEY ON CONFLICT OF LAWS, 5th edition
(p. 72)

"Area of Domicil. - The area contemplated throughout the Rules relating to domicil is a 'country' of 'territory subject to one system of law.' The reason for this is that the object of this treaties, in so far as it is concerned with domicil is to show how far a person's rights are affected by his having his legal home or domicil within a territory governed by one system of law, i.e. within a given country, rather than within another. If, indeed, it happened that one part of a country governed generally by one system of law, was in many respects subject to special rules of law, then it would be essential to determine whether D. was domiciled within such particular part, e.g., Brittany, of the whole ~~country~~, country, France or the southern portion of the district of Columbia, in the United States; but in this case, such part would be pro tanto a speparate country, in the sense in which that term is employed in these Rules".

(4) Pitt Cobbett's Cases on
INTERNATIONAL LAW,
vol PEACE by Grey

"how civil Status is determind.- From the point of view of British and American Courts, the question of civil satues is determined by the principle of domicile. That is a man's civil status will be deemed to depend on the law of the country in which is is, or is presumed to be, permanently resident (P.210). permanent residence in a particulaurs country, accompained by intent to remain, is regarded by the British Courts, as well as by the Courts of the United States and certain other countries, as determining the personal law by which a man's civil rights and liabilites are for the most part governed as the criterion, in fact, of his civil status (P.209). The same State, moreover, may comprise within its territory several contries each of which possesses its own system of private law; and in such a case each such country will be regarded as a separate entity or unit for the purpose of determining civil Status. So, a person domiciled in England, Scotland, or a British possession, will be deemed to possess a civil Status which will be governed by the private law of that particular part of the British dominions in which he resides (P.211)."

4. It is manifest from these authorities that domicile, as generally understood, means the place where a person has his permanent home. That place is properly the domicile of a person in which he has voluntarily fixed his abode not for a mere special or temporary prupose but with a peesent —

M.R.D.
16-5-
C.4

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intention of making it his permanent home. Again a man may have a commercial, a political or a forensic domicile, and all of these may exist at one and the same time or in different localities(Iyer's Law Lexicon of British India). Even in international law, accordining to Dicey and Pitt Cobbett, domicile need not be restricted to a country as such but can also be acquired in respect of a portion of the country or any local area which is subject to one system of law. This leads us to the question whether the Province of Bombay can have a domicile of its own vis-a-vis India as a whole. Since under the Government of India Act, 1935, the provinces are empowered to legislate for their own areas and have in fact their own special laws, it would follow that a person having his permanent residence within the province of Bombay could acquire a provincial domicile for the purpose of determining his civil status. The various Provinces of India having their separate laws would, as Dicey puts it, be pro tanto separate countries for these purposes of domicile. See also Beaman J's obiter observations in the case of Yates v. Pinto(13 Bom. L.R. 715 at P. 736) where he speaks of pinto having Bombay as his domicile of choice and being a British subject domiciled in Bombay.

5. Clause 4 of the present Bill makes a bigamous marriage void if inter alia it is contracted beyond the limits of the province of Bombay and either or both the contracting parties to such marriage are domiciled in the Province of Bombay. The general rule in all contries is that the marriage if good in the country where it is contracted is good all the world over; subject, however, to the qualification, that the marriage is not a marriage prohibited by the law of the country to which the parties contracting the marriage belong. The reverse principle also holds good, be namely ,that if the marriage is bad or prohibited by the laws of the country to which the parties contracting matrimony belong, it is bad everywhere. The principle that a marriage between persons who were forbidden to intermarry by the law of their domicile is invalid wherever celebrated was extended in Cottamoyar v. De Re rros(q) (1877) to the case of first cousins domiciled in portugal, and forbidden by the law of ~~the~~ that country to intermarry. The language of Lord Cairns in the House of Lords in 1863, though not spoken judicially, may be usefully cited here:

"My view of the law upon this point is this that if a man, being domiciled in a colony in which ~~that if a man being domiciled~~ it is lawful to marry a deceased wife's sister, does marry his deceased wife's sister, his marriage with her is good all the world over; whereas if the man is a ~~domic~~ a domiciled Englishman not domiciled in the colony, but merely resident there, his marriage with his deceased wife's sister in such circumstances is bad everywhere, because he carries the impediment of his domicile to such a marriage with him." (Foote's Privates International law(Marriage), PP.132-133

6. Adverting again to clause 4 of the Bill, there can be no doubt that where both parties who are domiciled in Bombay contract a bigamous marriage beyond the limits of the Province, that marriage would be bad all the world over. But the legal positions is not quite so clear in the case of a bigamous marriage contracted beyond the limits of the province between a party domiciled in Bombay and a party domiciled elsewhere, as for instance, in the Punjab which province has so far not prohibited bigamous marriages among Hindus. Even though such a bigamous marriage may not be regarded as void in the Pubjab , still, for the purposes of the Province of Bombay such marriage would be void, and the contracting party domiciled in Bombay would expose himself to the penalty of bigamy on his return to the Province.

7. I should be grateful if the Advocate General will please express his opinion on the points raised by me as early as possible so that the legal position can be explained to the Assembly during the second reading of the Bill. A copy of the Bill is attached.

Sd/-P.N.M.

Remembrancer of Legal Affairs.

U.R. to Adv. Gengeral. No. 407-P.confl, dated the 23rd August 1946.

M.R.D.
16-5-56
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IMMEDIATE
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87

No. 20 of 1946.

ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT,
BOMBAY, 3rd September 1946.

U.O. to the Advocate General, Bombay, No.4077-B./Consl.,
dated the 23rd August 1946.

Subject:- BILL.
The Prevention of bigamous marriages
among Hindus.

OPINION

(1) I agree with the exhaustive opinion of the Remembrancer of Legal Affairs.

(2) The provincial legislature can make laws for the Province. Even if a Provincial law does not as it in Bill does specifically mention the acts, persons or property to which it is to extend, its operation would still be limited, and the limitations would have to be determined in relation to a given set of facts. I cannot see how, when such a law affects persons, their capacity to contract, or indeed any acts done by them, the limitations can be ascertained or applied, at least in a large number of cases without reference to the domicile of both or one of the parties.

(3). Domicile is not necessary a matter of "nationality", it is based on territorial division, that is to say, a division into territories to which different sets of laws apply. Privinafl domicil is well recognised in those countries where different portions of the same country have different laws, e.g. America, Australia and to some extent Great Britain where there is a difference between the law applicable in Scotland and in England. In my opinion the Remembrancer of Legal Affairs' conclusion that there can be a Provincial domicile is well founded on the texts and authorities cited by him.

(4) The element of domicile is an important and often the fundamental consideration in determing the validity of a marriage. Thus the "essential validity" of a marriage is governed by the law of the domicile of the parties. If by the law of the domicil a marriage is void abinitio because prohibited or illegal it will void everywhere -

e.g. Dock v. Dock 1861 - 9 H.L.Cases 193, and Green Hoyes v. Pitin, 1909, 25 T.L.R. 222.

If, therefore, two persons domiciled in Bombay Province whose marriage is prohibited by a law, marry anywhere, the marriage would not be recognised in any part of India or elsewhere as valid.

(5) As to what the position would be, if only one party were domiciled in the province, there is considerable doubt and difficulty. A marriage with only one party domiciled in the Province, if celebrated in the Province would not be recognised as valid in the Province or elsewhere. But whether such a marriage will be recognised or not outside the province if contracted outside the Province, is a moot question, depending to some extent on the system or law prevailing in the other place . If only one party is domiciled in the Province and so under a disability, if the marriage is contracted in the province, it would be regarded as void in and outside the province. But if celebrated outside the province, the consequences are rather complicated. In the province, it would, for all purposes be bad, but in other places, the answer would depnd on the system of law there prevailing, for instance, English Courts will not regard the validity of a marriage as affected, where one party is domiciled in England and the other not, if the marriage is contracted in England and the incapacity imposed on the other party is one not recognised in English Law. Cheshy on Cheshy 25T.L.R. 1946 — 146 Halsbury, vol VI P. 226.

(6) There has however been some difference of opinion as to whether the question is one of status, or contract - a dictum in Sottomayir's Case, seems to imply that it is one of capacity or status, but in Ogden v. Ogden - 1908 P.46, it was said by Hamen J. to be of "illegality" rather than capacity or status. If that is correct, thenit would appear that the very fact of a marriage being illegal under the provincial law whether one or both parties are domiciled in the province would make it illegal everywhere.

(7) In my opinion, both parts of Section 4 are properly framed and do not beyond the considerations which a court would take into account even if the law laid down no specific provision, such as are contained in section 4.

Sd/-

Advocate General.

P.M.D.
16-5-56
C.A.

Tele: Adress
"CANTEL"

No. 3530/I of 1945-1946.

From

The Law Secretary to
His Highness' Government,
Kotah.

To

The Secretary to the Government of Bombay,
Legal Department.
Bombay.

Dated Kotah, the 29th July, 1946

SUBJECT:- Acts prohibiting bigamous and unequal marriages.

Sir,

With reference to your letter No. 119-L, dated the 1st July, 1946 on the above subject, I am directed to say that there is no law enacted by His Highness' Government to prohibit bigamous marriages. There is, however, an Act called "Sanoon Shadi" in Hindi which prohibits unequal and child marriages, copy of which is herewith forwarded to you. This Act is under revision and is also forwarded to you.

I have to honor to be,
Sir,
Your most obedient servant,

Sd/-

Law Secretary to
His Highness' Government.

N.R.D.
16-5-56
C.A.

Proceedings of the select Committee on

L.A. BILL NO. XII OF 1946(A BILL TO PROVIDE FOR THE PREVENTION OF BIGAMOUS MARRIAGES AMONG HINDUS).

The Select Committee on L.A. Bill No.XII (A Bill to provide for the prevention of bigamous marriages among Hindus) met in the Committee Room of the Council Hall, Poona, at 12-30 p.m. on Thursday, the 15th August, 1946, Mr. Nowrozji B. Damri (Minister for Home) presiding.

Present:

- Mr. Nowrozji B.Damri(Minister for Home), Chairman.
- Mrs. Tarabai Modak,
- Mrs. Gumatibai R. Gore,
- Mrs. Lilavati K. Munshi,
- Dr. M.D.Velinkar Patu,
- Mr. V.P. Pawar,
- Mr. Lalubhai J. Patel,
- Mr. S.H. Panthi, and
- Mr. Dinkarrao K. Desai(Minister for Law)

also - Mr. P.N. Moos, O.I.E., ICS, Secy. to Govt., Legal Dept.
Mr. S.K. Ghaste, Secy. to the Bombay Legislative Assembly.

Clause 1:

Mr. Lalubhai J. Patel: can we make the Bill enforcible from the date of its first publication? It is done in the case of Finance Bills.

The Chairman: No, it cannot be done in this case. You cannot create a crime and make it retrospective in effect.

Mr. Lalubhai J.Patel: Recently two marriages took place in Ahmedabad. We must curtail the time as much as we can.

The Chairman: We may say that it becomes law from the date of its publication as Act.

Mr. Dinkarrao K. Desai: Then, we should delete sub-clause(3). Under the General Clauses Act, when no date is mentioned, the Act comes into force from the date of its publication.

M.R.D.
5-5-56
C.4

Dr. Natu: Is the Divorce Bill being got ready?

The Chairman: It is being.

Dr. Natu: Can we not bring into force both these Bills concurrently? It is necessary

The Chairman: The other Bill will come before the next Assembly.

Clause 3.

Mrs. Munshi: Eighteen is the recognisedage of majority. Why not adopt that? If we keep 'sixteen' the case will have to go before the juvenile court.

The Chairman: Juvenile courts exist only in certain cities; they do not exist everywhere. Marriage is void whatever the case. If it goes before a juvenile court, so much the better. He will have to spend threem years in a Reformatory.

Mr. Bahubhai J.Patel: What is the objection to 'eighteen'? Eighteen is the age of majority.

Mr. Dinkarrao N.Desai: Sixteen years is the age of majority for marrying marriages. Boys above sixteen will be able to contract marriages, and you cannot hold their parents responsible.

Mr. Hoss: Under the ordinary law, the parent won't be the guardian.

Mr. Bahubhai J.Patel: Why not include Buddists also among Hindus?

The Chairman: They are Hindus; no special provision seems to be necessary to include them.

Mr. Bahubhai J. Patel: But you are including Jains.

The Chairman: The Jains do not admit they are Hindus. Moreover, we have no Buddhists in the Province.

Mr. Dinkarrao N. Desai: We may include Buddhists.

The Chairman: Then, we may add "Buddhists".

Mrs. Hansa: Can we allow others to marry under this Act. They may want to do that voluntarily.

The Chairman: No. That will be changing the scope of this Act. This is not a Marriage Act. If anybody wants it, he can marry under the Civil the Civil Marriages Act.

Mr. Mooss: He can get himself converted to Hinduism and then marry under this Act.

Dr. Natu: Is there any legal definition of "convert"?

The Chairman: It must be under some regular ceremony conducted by the Arya or Hindu Samaj.

Dr. Natu: A man may change his religion and marry a second time. Or he may marry and then change his religion.

Mr. Dinkarrao B. Desai: If he marries and then changes his religion, he is liable under the Bill; if he changes his religion and then marries, that is quite different.

The Chairman: He cannot become a Muslim and marry a Hindu. Both will have to be Muslims.

Dr. Natu: Cases of change of religion to marry a second time will be more frequent if this Bill is passed.

Mr. Dinkarrao B. Desai: We can then amend the Indian Penal Code, making an exception of Mahomedans.

M.R.D.
17-5-56

(contd by mr)

Clause 4.

Mrs. Munshi: I am not very happy about the use of the words "domiciled in this province." Is there a domicile for the Province of Bombay as such?

Chairman: Then take the words out. But what do you suggest we should substitute therefor?

Mrs. Munshi: How are you going to determine whether a person is domiciled in Bombay or not? If the place of residence is to be the governing factor, a person may have more than one place of residence.

Mr. Dinkarrao Desai: That will be decided in accordance with the provisions of the Indian Succession Act. If a person is permanently residing in Bombay, he will be deemed to have a domicile in Bombay.

Mr. Hoss: It is a question of fact. Domicile has to be proved.

Chairman: Then I think all the Parsadis and Sikhs will escape. Will they not?

Mr. Dinkarrao Desai: Yes, many will. You cannot make a law with regard to a person who does not belong to the Province of Bombay.

Mr. Babubhai J. Patel: Can a man holding property in Bombay be deemed to have a domicile in Bombay?

Chairman: You can keep property in all parts of the world, but do you become domiciled in all those parts? No, that cannot be. Domicile means that you are born in a particular place or that you have taken domicile and under the law of the country concerned.

Mr. Dinkarrao Desai: That is a term known to the law, and the interpretation, as known to the law, will apply.

Chairman: Yes; we cannot make it more clear or definite. In whatever other way we may try to clarify it, it will infringe upon the laws of the other Provinces. We cannot do that. Of course, I agree that there may be some people who will escape the provisions of this Bill, but that cannot be helped. If we are (Contd

to ensure that nobody escapes the law, then we must have a Central-2 legislation. Till then we must be prepared for some lapses, and we can only try to cover almost all cases. That we have attempted to do by introducing the words "either or both the contracting parties." That, I th think, is the best that we can do under the circumstances.

Dr. Natu: I have one other point. This Bill makes monogamy absolute. I think there must be some provision for a man to marry a second time if his first wife has some disease or for some other valid reason.

Chairman: That question can be considered when the Divorce Bill is framed.

Dr. Natu: And there must be some provision by which the first wife may remain in the house if the husband agrees to that. Otherwise, if there is a divorce, the first wife has no place in the family and that would be a hardship to women.

Mr. Dinkarrao Desai: That is the consequence of monogamy.

Chairman: The Divorce Bill is not here now. We can consider all these at the time of framing it.

Mr. Dinkarrao Desai: His suggestions is that there should be special exceptions in the case of monogamous marriages. If we do that, then the whole object will be defeated. There must be either monogamy or bigamy; there cannot be an alternative.

Dr. Natu: What I say is that if a woman is thrown out of the family, that will be a hardship.

Chairman: Even if she remains in house, there will not be any happiness. Every slave may think that he is happy under his master. That is why the salve has got to be taken out.

Dr. Natu: If you take them out, will the State accept them?

Chairman: No, the State will not. The husbands will have to pay for the maintenance of this wives.

Dr. Natu: And where will they go? Will the State Provide asylums?

Chairman: Asylums are there, and we will provide more if the there are many such cases.

M.R.D.
17-5-56
C4

The point is that you defeat monogamy as soon as you make exceptions.

Dr. Ratu: It is not that. The question is of framing exceptional provisions to meet certain exceptional circumstances.

Mrs. Kodak: I also think that some such provision will have to be made in the Divorce Bill. The first wife, if she wants to remain in the house, may be allowed to do so. There are some houses where the first wife would be treated as a member of the family, and even the second wife would respect her as a senior member of the family. If now such provision is made, the first wife will lose her status.

Mr. Dinkerrao Desai: We can consider that when the Bill is drafted.

Chairman: You are talking of the status. That status is a wrong status. How many cases are there where the first wife is happy? Show me some cases and I am prepared to investigate them. The first wife has to serve as the dasi of the second wife, and there is no happiness. For the small satisfaction of a wrong status, you want to keep here in the house. I would take her out of the house altogether.

Mr. Ratu: There is another point. Unless there is a registration of the first marriage, how will you prove that there has been a second marriage?

Mr. Dinkerrao Desai: If a man conceals the first marriage, he is punishable under section 494 of the Indian Penal Code.

Clause 4 accepted without any amendment.

Clause 5.

Mrs. Hingshi: Why are the words "void under section 4 " appearing in this clause? Are theywere necessary?

Mr. Dinkerrao Desai: They are inserted for the sake of provision.

Clause 5 accepted without any amendment.

Clause 6.

Mrs. Hunshi: Are you going to limit the fine to a specific amount?

Chairman: Is it necessary? That may be left to the power of the magistrate. We are providing that cases arising out of this Bill will be tried by the Presidency Magistrate or a Magistrate of the Presidency. That means that the fine may go up to Rs. 1,000/- But if there is an appeal, the Sessions Judge may impose any amount of fine — there is no limit to that.

Mrs. Modak: Some people think that the term of imprisonment of six months is too short a period.

Chairman: I am prepared to make it six years. The point is that if a major contracts a bigamous marriage, he will be punished under section 494 of the I.P.C. Under that Clause, the imprisonment extends to a period of 7 years. This period of six months applies to persons who abet. I think that is sufficient.

Mr. Babubhai J. Patel: What is the meaning of the word "abets"?

Mr. Dinkerrao Desai: That has got a specified meaning under the law.

Clause (a) accepted without any amendments.

Clause 7.

Mr. Babubhai J. Patel : What is the meaning of word "contracts"?

Chairman: A minor cannot enter into a legal "contract". Is that word proper there?

Mr. Dinkerrao Desai: He can enter into a contract, but that contract is not valid . Here, the word will only have ordinary dictionary meaning.

Mrs. Hunshi: Why should we insert the word "unlawful"?

Mr. Dinkerrao Desai: There are people who bring small girls in the city and get them married to other people. When the girls are in these their possession, they will be under unlawful custody. The word will cover such cases.

Chairman: Besides there are kidnappings also. The word

will cover such cases. So, there is nothing to be amended in this clause except for the addtion of the word "with" before the word "fine" in sub-clause (1). That is verbal amendment.

M.R.D.
17-5-56
C.4

cont. by nga.

15-8-46
2-30 p.m.

The Chairman: Clause 8 may remain as it is and so also clause 9 (After a pause):

We thus pass the whole Bill without anychange.

Such changes as have been suggested are of minor importance and will be carried out. Briefly the changes are :-

(1) to add "Buddhists" in definition clause 3(2); and

(2) to add the word "with" before the word "fine" in the last line of clause 7(1).

Mr. Gore: I have a letter here in Marathi(She reads out the letter). The point raised in the letter is whether marriages in lower castes which are known by various appellations such as 'nata', 'motur', etc. are also covered by the present Bill.

The Chairman: They are all marriages by custom and so they are naturally included. We are, however, powerless to provide against illegal practices, e.g. a man may keep a mistress or a paramour.

By custom bigamy is prohibited in Hindu Community, and I find that that it is the happiest community.

Mr. Patel: Does our consent to the present Bill means our consent to the Divorce Bill also?

The Chairman: You can certainly oppose it. But as a matter of fact one thing goes with the other and all you can do is to make divorce more stringent.

Man is possessed of brute force and the object of this Bill is to curtail that brute force in him which will ultimately lead to the happiness of both man and woman.

M.R.D.
17-5-56
C.4

Telegraphic Address
"MATTRI"

No. 3624/I of 1945-46.

From

The Law Secretary
to His Highness' Government,
Kotah.

To

The Assistant Secretary
to the Bombay Government,
Legal Department,
Council Hall, Poona.
Dated Kotah, the 17th Aug., 1946

SUBJECT:- Acts prohibiting Bigamous and unequal Marriages.

Sir,

I am directed to acknowledge receipt of the post copy, dated the 10th July, 1946, of your telegram(not received) requesting copies of the Acts mentioned above.

2. I am to intimate that there is no law enacted by His Highness' Government to prohibit bigamous marriages while a copy of the "Cannon Shodji" which prohibits unequal and child marriages, along with a copy of the draft Child and Disparate Marriage Restraint Act intended to replace the said "Cannon" was forwarded to the Secretary, Bombay Government, Legal Department, Bombay on the 29th July, 1946. It is hoped that even though, by oversight, those copies were not sent to your Poona address, they have been received by now you by now.

I have the the Honour to be
Sir,
Your most obedient servant,

Sd/-
Law Secretary.

N.R.D.
17-8-46
C.4

No. 7673

Legal Department,

Bombay Castle, 2nd November 1946.

From

P.N. Moos, Esquire, O.I.E., I.C.S.,

Secretary to the Government of Bombay.

To

The Secretary to the Governor of Bombay.

Subject:- A Bill to provide for the prevention of bigamous marriages among Hindus.

Sir,

With reference to section 75 of the Government of India Act, 1935, I am directed to forward herewith for the assent of His Excellency the Governor, an authentic copy of a Bill to provide for the prevention of bigamous marriages among Hindus, which was read for the third time and passed at the meetings of the Bombay Legislative Assembly and the Bombay Legislative Council held on the 24th September 1946 and the 12th October 1946 respectively.

2. None of the provisions of the Bill affects any special responsibility of the Governor under section 52(1) of the Government of India Act, 1935 or falls within the purview of the clause(a),(b), or(c) or (d) of paragraph XVII of the Instrument of Instructions to the Governor of Bombay.

3. The subject-matter of the Bill falls under entires 1,2& 5, and 6 in List III in the Seventh Schedule to the Government of India Act, 1935.

4. The Bill does not contain any provision repugnant to the provisions of any earlier Federal law or an existing Indian law with respect to any of the matters enumerated in the Concurrent Legislative List. It is not therefore necessary to reserve the Bill for consideration of the Governor General with reference to section 107(2) of the Government of India Act, 1935.

5. The date on which His Excellency the Governor's assent is given may kindly be entered in the endorsement.

6. I am also to forward herewith one copy of each (Contd).

P.T.O.

1. Bill as introduced in the Bombay Legislative Assembly with the Statement of Objects and Reasons.	of the papers noted in the margin.
2. Report of the Select Committee together with the Bill as amended by the Select Committee.	
3. Bill as read for the third time and passedd by the Bombay Legislative Assembly and as introduced in the Bombay Legislative Council.	
4. Bill as read for the third time and passed by the Bombay Legislative Council.	
5. Extracts from the proceedings of the Bombay Legislative Assembly dated the 26th July and 2nd and 24th September 1946. and of the Bombay Legislative council dated the 12th October 1946	

I have the Honour to be,

Sir,

Your most obdient servant,

Sd/-

Secretary to the Government of Bombay,

Legal Department.

Through
The Secretary to the Government of Bombay,
Home Department.

M.R.D.
18-5-46
C.4

No. G.S. 4066.
Office of the Governor's Secretary
Government House,

From

D. Symington, Esquire, CIE. ICS.

Secretary to the Governor of Bombay,

To

The Secretary to Government,

Legal Department, Bombay,

Bombay, 6th November 1946,

Subject:- The Bombay Prevention of Hindu Bigamous Marriages Bill, 1946.

Sir,

With reference to your letter No. 7677, dated the 2nd November 1946, I am directed to return herewith, with His Excellency the Governor's assent signified thereon, the copy of the Bombay Prevention of Hindu Bigamous Marriages Bill, 1946.

Your obedient servant,

Sd/-

for Secretary to the Governor of Bombay.

H.R.D.
17-5-56
V.A.

Appx.

Publication of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946.

GOVERNMENT OF BOMBAY,
Legal Department.
Resolution No. 7790
Bombay Castle, 6th November 1946.

Letter to the Secretary to the Governor, No. 7673, dated the 2nd November 1946.

Letter from the Secretary to the Governor, No. GS. 4066, dated the 6th November 1946:

"With reference to your letter No. 7673, dated the 2nd November 1946, I am directed to return herewith, with His Excellency the Governor's assent signified thereon, the copy of the Bombay Prevention of Hindu Bigamous Marriages Bill, 1946."

RESOLVED:- The Act should be published as Bombay Act No. XXV of 1946 in the Bombay Government Gazette, dated the 6th November 1946.

2. The Act should be translated into Marathi, Gujarati, Kannada and Hindustani (in Urdu and Devanagari Scripts) and the translations should be published in the Bombay Government Gazette.

3. A copy of the Act should be forwarded to the Home Department with reference to the memorandum from that Department No. 322/5-B, dated the 19th July 1946.

By order of the Governor of Bombay,

Sd/-
G.N.DHANAWATI,

Additional Assistant Secretary to Government,
Legal Department.

To

The Manager, Government Central Press, Bombay (with a copy of the the Act and with a request that 15 Gazette copied of the Act may be forwarded to the Legal Department).

The Home Department,
The Oriental Translator to Government,
The Secretary to the Bombay Legislative Council,
The Secretary to the Bombay Legislative Assembly,
The Director of Publication Bombay,
} with a copy of the Act.

With five certified copies of the Act.

M.R.D.
17-5-56
C.A.

1. Article 13(1) of the Constitution provides that all laws in force in the territory of India immediately before the commencement of the constitution in so far as they are inconsistent with the provisions of this part shall to the extent of such inconsistency be void.

This clause being in the nature of a repealing provision must be construed strictly and unless its express terms provide for making any law void or justifying such necessary information, it would not be proper to hold that such law is included within its scope.

The expression used in the clause is "laws in force" in the territory of India immediately before the commencement of the Constitution. The expression is not "any law". It must be a law in force at the particular point of time i.e. immediately before the commencement of the Constitution. The expression "laws in force" is defined in clause(3) of the article. It includes laws passed or made by a legislature or other competent authority in the territory of India before the commencement of the Constitution. It is then added that any such law must not have been properly repealed. The essential attribute of this clause is:(1) such law must be passed or made by a legislature or competent authority, and (2) it must be such as is capable of being repealed.

2. It is true that the word 'law' includes any Ordinance, Order, bye-law, rule, regulation, notification, custom or usage having the force of law is also included.

It is true that the definition of 'laws in force' is an inclusive definition. But it is (Contd)

H.R.D.
17-5-56
C.A

clear that it differs from the definition of 'laws in force' in the essential attribute which the latter has. A custom or usage can be deemed to have been passed or made by authority; It has not the force of law unless it is ancient, certain and reasonable and has been proved to the satisfaction of the Court. In the expression'laws in force' the Legislature did not intend to include custom or usage, more particularly in the use of that expression in clause clause(1) of Art. 13which makes the laws void, if they are inconsistent with the Fundamental Rights in part III of the Constitution.

An important rule with regard to the effect of an interpretation clause is that an interpretation clause is not to be taken as substituting a set of words for another or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances required that it would should be so comprehended. If, therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that it is on each occasion used in the extended meaning. (Craves on Statutes p. 193rd. Ed. 3rd).

It should, therefore, be contended that although the expression 'laws in force' as used in clause(1)of article 13 may on account of its inclusive nature or enumerative character include statutory instruments as bye-laws, rules or notifications; it does not include a custom or usage, although it may have the force of law. If it was the intention, it would have done so in express term. The definition of both 'laws' and 'laws in force' are preceded by a saving clause (Contd.).

H.N.D.
17-5-56
C.4

'unless the context otherwise provides'. It is, therefore, clear that it would not be right to hold that the context in which the expression'laws in force' has been used in clause(1) of article 13 includes a custom or usage h having the force of law. The object of the framers of the Constitution seems to be that the Guarantee of Fundamental Rights should have the effect of invalidating all laws which are definite and certain and not customs and usa usages which maybe be indefinite and uncertain.

3. The second argument should be that both the expressions'law' and 'laws in force' in article 13 do not include what is known as personal law'). The The Constitutional Enactments have differentiated between 'personal Laws' and usages or customs of various communities in India.

Section 17 of 21 Geo III c. 70 (East India Company Act) provides as follows:-

How the Supreme Court shall determine Actions between Mahomedan and Gentu Inhabitants of Calcutta.

"XVII. provided always, and be it enacted that the supreme Court of Judicature at Fort William in Bengal, shall have full power and authority to hear and determine in such manner as is provided for that purpose in the said charter or letters patent all and all manner of actions and suits against all the singular the inhabitants of the said city of Calcutta; provided that their inheritance and succession to Lands, Rents, and Goods, and all matters of contract and Dealing betweenbetween party and party, shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans and in the case of Gentus, by the laws and Usages of Gentus; and where only one of the parties shall be a Mahomedan or Gentu, by the Laws and Usages of the Mahomedan defendant."

Section 13 of 37 Geo III C. 142 (The East India Company Act) provides as follows-

M.P.D.
17-5-56
C.4

(see 13,37, Geo III, C. 142) 1797.

Courts may determine Suits against the Inhabitants according to the Charter, but their Inheritance of Lands, etc., to be determined as would have been done in a Native Court; and where One party is a Mahomedan or Gentu, by the Usages of the Defendant, etc.

XIII. And be it further enacted, That the said Courts so to be erected as aforesaid, shall have full power to hear and determine all Suits and Actions that may be brought against the Inhabitants of Madras and Bombay respectively, in the Manner that shall be provided by the said Charater; yet nevertheless, their Inheritance and Succession to Lands, Rents, and Goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the Laws and Usages of the Mahomedans, and where the Parties are Gentus, by the Laws and Usages of the Gentus, or by such Laws and Usages as the same would have been determined by if the Suit had been brought, and the action commenced, in a Native Court; and where One of the Parties shall be a Mahomedan or Gentu, by the Laws and Usages of the Defendant; and in all Suits so to be determined by the Laws and Usages of the Natives, the said court shall make such Rules and orders for the conduct of the same, and frame such process for the Execution of their Judgements, Sentences, or Decrees, as shall be most consonant to the Religions and Manners of the said Natives, and to the said Laws and Usages respectively, and the easy Attainment of the Ends of Justice; and such Means shall be adopted for compelling the Appearance of Withnesses and taking their Examination, as shall be consistent with the ~~said~~ said Laws and Usages, so that the said Suits shall be conducted with as much safe, and at as little Expense as is consitent with the Attainment of substantial justice.

M.R.D. -
17-5-56
C.4

Sec. 112 of the Government of India Act; 1915 (5 & 6 Geo. V Ch.61) reads as follow:-

Law to be administered, in cases of inheritance and succession.

"112 . The high courts at Clacutta, Madras and Bombay, in the exercise of ~~theder~~ their orgginal jurisdiction in suits against inhabitants of • of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is • subject."

By section 223 of the Government of India Act, 1935, the High Court had to administer law in accordance with the provisions of the above section. Sok laso under the present Constitution, under article 225 the High court has to adminster law accordingly.

M.R.D.-
17-5-56
C,4

4. The above provisions refer to the personal law as distinguished from usages or custom. It is true that the above provisions are restricted to Presidency Towns. But so far as the mofussil is concerned, the same is law. Section 26 of Bombay Regulation IV of 1827 refers to the personal law as the law of the Defendant(I.L.R. 55 I.A. 171, 52 Bom.510, I.L.R. 26 Bom.) Acts similar to Bombay Regulation Iv of 1827 or section 112 of the Government of India Act, 1935, are in force enjoining courts to apply personal laws of the parties. They are:-

(1) Bombay Small Causes Court Act, 1882 - Section 16

(2) The Bengal, Agra and Assam Civil Courts Act, 1887 - Section 37.

(3) The Madras Civil Courts Act, 1873 - section 16.

(4) The Punjab Civil Courts Act, 1872 - Section 5.

(5) The Oudh Laws Act - section 3.

(6) The Ajmer Courts Regulation, 1877 - section 6.

(7) The Central provinces Laws Act, 1875 - Section 5.

some of these laws refer to the personal laws of marriage.

5. The next question which arises is penal law as understood in India. According to Maynes "In India there is no lex loci, every person being governed by the law of his personal status." The passage from Libert's Government of India quoted in Saldanaa v. Saldana (I.L.R. 54 Bom. 288 at p. 299) is held to explain accurately the tendency of courts and legislatures in India in regard to Personal (Contd)

H.R.D.-
17-5-56
C.4

Law. Hindu Law as applied to Hindus as their personal law in this sense(See Mitar Pan v. Nagpal Hasan Kha I.L.R. 57 I.A. 313 at p. 325; Merarji v. Administrator General I.L.R. 52 Mad. 169). It is essentially and pre-eminently a law of status. The status of a person pre-eminently largely the particular rule or set of rules to be applied(see Gupta's Hindu Law, P.5) The law of Thermasastras is a comprehensive system of jurisprudence. It has also its own system of exposition(Sh yah Pan v. Bhaya Ujar 13 M.I.A. 373, Ramlakshmi v. Vinayak(1914) 41 I.A. 290 , 299). Custom may be a source of any law. But personal laws in India are not wholly and entirely custom.

6. Apart from the question whether custom or usage having the force of law are saved from the provision of article 13(2) of the Constitution, and apart also from the question whether Personal Law is equivalent or synonymous to custom or usage, if the Legislature intended that article 13(1) applies to "Personal Laws", it would have done so in express terms in view of the fact that several constitutional amendments had made express reference to it. This inference is supported by the inclusion of article 44 of the Constitution . Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. That article, therefore, presupposes differences in laws relating to civil matters such as marriage, succession, etc., and, therefore, enjoins the State to endeavour to secure for the citizens a uniform civil code throughout the territory (contd)

P.S.D.
17-5-56
C.4

India . The deliberations of the Constituent Assembly under this article in Vol. 7 at p. 547 make it clear that the Constituent Assembly was well-aware of the fact that the personal laws applicable to various communities in India were different and that it should be the endeavour of the State to make them uniform. If the contention is that all personal laws which are based on usages or customs in the communities are made void under article 13(1), there was no necessity for enacting article 44. It is, therefore, clear that in construing article 15 it must be held that the personal laws of the various communities in India would not be hit by that article. The personal laws of the parties are similar to the rules of common law and, as pointed out in America, no person has got a vested right in the rules of common law. It is open to the State to modify the rules of common law in any reasonable manner. If that is so, the rules of personal law which are enforced by the courts would not be affected by the provisions or article 13 or 15. Those rules of personnal law are applied by the courts under article 225 of the Constitution and Bombay Regulation IV of 1827 and similar Acts in force in other States.

7. The second point which appears to have been urged is that the Bombay Hindu Bigamous Marriages Prevention Act makes offences thereunder cognizable and makes the abetment thereof specially punishable. It is, therefore, urged that the provision which differ from the provision of the Indian (Contd)

M.R.D.-
17-5-56
C.4

Indian Penal Code and Criminal Procedure Code amount to discrimination. A simple reply to this contention should be that the offence of bigamy under the Bombay Act is a special offence quite distinct and separate from the offence of bigamy under the Indian Penal Code. It is not the same offence. Both section 5 of the Indian Penal Code as well as section 5(2) of the Criminal Procedure Code serve special laws. There is therefore no discrimination. It can, therefore, validly repeal the provisions of theIndian Penal Code and the Criminal Procedure Code.

8. If it is once established that personal law is not affected by anything in part III of the Constitution and so far as this is concerned by article 16, there would not be any difficulty in holding that any State law in so far as it abrogates the personal law of a class or grup, although such group may be a religious group, is not invalid. Any special provision in regard to offences relating to such group cannot be invalid. If the Bombay Hindu Bigamous Marriages prevention Act is to be held invalid, the Christian Marriage Act, 1872, the parsee Marriage Act, so also the Muslim rule of marriage restricting to a marriage with four women will have to be deemed to be invalid. In consequence various laws affecting succession, divorce and other social relations peculiar to various communitites whether they are written or unwritten will have to be held invalid.

M.R.D.-
17-5-56
C.4

Notes on the Constitutionality of the Hindus Bigamous etc. the Act.

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(1) Article 15 can nver be attracted to the operation of the personal laws in this country. Such laws, necessity, invole differences of treatment in topics like marriage inheritance if that article were to be attracted. The entire body of personal law(Hindu, Mahomedan and customaries will have to be declared void as inconsistant with that article.

(2) This position is implicitly recognized in the constitution itself, Article 44 enjoins on the State the duty of endeavouring to secure for the citizens a Uniform civil Code throughout the toritory of India. State here would include the Provincial Govt. in respect of topics of civil Law within its exclusive or concurrent jurisduction. This article assumes that the present lack of uniformity in matter which admirely come within the scope of a civil code is constitutional in the secure of not being inconsistant with consitution ; for, if it were so inconsistant, there would be no scope for the "endeavour" which the article enjoins.

(3) If article 15 were to be attracted., article 372 would not save the personal Laws.

(4) Discrimination against is not the same thing as not uniformity. Personal Laws have the latter characteristic and nor the former. The former is something stranger - requiring a positive Provision prejudicial to the interest of the citizen.

(5). It has been hled by American Courts that the "discriminatory principals are not intended to affect the established usage. suggestions to that effect are to be found in the excerpts judgement(majority) given as the book of the " discenting oponion.

(6) Section 494 of the I.P.C. show that the question whether a marriage to be declare void was always left to the personal Law. That has been the established usage.

(7) The Act, is an attempt to bring more cases upto the general fold; which that point of view cannot receive discriminition. It is an attempt towards uniformity enjoined by article 44.

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23-6

M.R.D.-
11-3-56
C.4